Free Speech Values, Public Schools, and the Role of Judicial Deference

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INTRODUCTION

Some of the plainest axioms of free speech law are among those most widely and unselfconsciously violated by reviewing courts. For example, courts often ignore the claims of the common sense principle that the scope of application of free speech protection should extend up to but not beyond the point where the broad purposes or values arguably underlying the free speech clause are no longer significantly implicated. Similarly, given the important interests in free speech rights, responsible political experimentation, and the role of local democratic institutions, the courts should tend to defer to local elected officials on free speech issues where, but only where, the local political decision-makers possess the relevant, decisive comparative advantage with respect to the precise free speech issue at hand.

These basic principles are commonly violated in areas such as obscenity and pornography, but their widespread violation is perhaps most graphically seen in the numerous recent cases discussing the free speech right claims of public school students. This Article depicts the current judicial indifference to the above principles in attempting to resolve the student speech cases and encourages a movement toward greater fidelity to those principles.

I. CURRENT CASE LAW AND THE BACKGROUND OF FREE SPEECH VALUES

The judicial touchstone for the free speech rights of minor children in public schools has of course been *Tinker v. Des Moines Independent Community School District*,[1] in which several youngsters were disciplined for violating a newly promulgated school rule that prohibited their wearing black armbands in school. The Court held that a student in the position of the petitioners "may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer[ing] with the require-

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1. 393 U.S. 503 (1969).

ments of appropriate discipline in the operation of the school' and without colliding with the rights of others."[2] The Court did little in *Tinker* to discourage the assumption that both the "appropriate discipline" and "rights of others" defenses to student speech claims would be construed rather narrowly.[3]

The Court's interest in placing its decisions in this area in the context of broad free speech values or purposes, or in confirming the correctness of its analyses by means of linking its results to the promoting of such values, has been limited. To the extent that the Court has attempted this task, it has resorted too quickly to rhetoric and to platitudes. One widely cited, broadly inclusive formulation of the values or aims sought to be achieved or protected through the free speech clause holds that:

> The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.[4]

Other widely recognized formulations differ as to emphasis,[5] and some are significantly narrower,[6] but none is significantly more expansive or inclusive.[7] Our thesis in this regard is that in an ordinary *Tinker*-type student speech case, and in a variety of related cases, elected school officials or their agents could reasonably feel that any judicially recognized free speech goals or values would not be subjected to a significant net impairment by the most common and moderate sorts of restrictions and sanctions imposed upon student speech.

With respect to the value of individual self-fulfillment, Professor Emerson has argued that this concern is derived from the basic premise that "the proper end of man is the realization of his character and potentialities as a human being."[8] He explained that "expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted."[9] While this formula-

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2. *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)) (brackets in *Tinker*).

3. *See id.* at 513. The Court's most recent examination of these broad issues was in Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986).

4. Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877, 878-79 (1963).

5. *See, e.g.*, Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

6. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT 61-75 (1975); A. MEIKLEJOHN, POLITICAL FREEDOM 26-27, 79-80 (1965); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23-25 (1971).

7. *See, e.g.*, Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Bloustein, *The Origin, Validity, and Interrelationships of the Political Values Served by Freedom of Expression*, 33 RUTGERS L. REV. 372 (1981); Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137 (1983); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

8. Emerson, *supra* note 4, at 879.

9. *Id.*

tion is certainly broad enough to implicate a variety of forms of student speech within public schools, the difficulty is that just these sorts of developmental and self-realizational aims are a major element of public school education itself, in general, and of each of the constituents of its curriculum, however defined. At a minimum, a public school could responsibly take such a view.

If so, why should an alleged free speech right of students, insofar as it depends solely on a self-fulfillment value argument, be thought to override the school's authorized pursuit of just this value through its broader curriculum and its individual components? Individual capacity development through wearing a politically expressive armband in math class might well be thought, on some reasonable pedagogy, to conflict with or distract full attention from the equally important individual capacity-developmental function of exploring the basic principles of mathematics. If all are agreed on the importance of free speech and its underlying values or purposes, the federal courts do not appear to have any clear comparative advantage over locally elected decision-makers in ascertaining the best mix of school activities for promoting self-realization and development.

The question has been posed: "Should the primary goal of education be to enhance the self-realization of the student or to mold the student to advance the common goals of society?"[10] This apparent antinomy is, at least for our purposes, resolvable. The approach to student speech issues elaborated and defended below would first require the minimal showing that the challenged restriction promotes some legitimate pedagogical goal sought by the relevant school officials. It would also require a showing that the challenged restriction is not crucially inconsistent with or destructive of the broad development, growth, and flourishing of the student's capacities for individual self-realization as a future adult possessed of mature and developed free speech capacities.

It is easy to suppose, and perhaps even correct, that "free speech plays an important role in the child's development . . . ."[11] It may even play an indispensable role. But this is not to show that there must or should be a judicially enforceable right of the minor student to speak out on most or each of the particular occasions on which the student might seek to assert such a right. We should recognize instead, in the public school child, a presently enforceable free speech right prohibiting restrictions imposed by the school in such a way as to significantly impair, inhibit, or otherwise "stunt" the development of the student's future free speech-relevant capacities as an adult. But this right does not logically require that the child in effect be granted a constitutional right to participate in determining, unconstrainedly, the public school's broad curriculum in particular respects. Under our constitutional standard, a school generally is not barred from determining that students obtain ample practice and experience in speaking freely in non-school environments. It may even operate on the theory that certain sorts of regimentation, control, and hierarchical discipline within school may tend to produce graduates who are more generally free speech competent, in the sense that they have more fully, openly, and adaptably developed their capacities for logical thought, and organized, persuasive presentation,

10. Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1649 (1986).

11. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 338 (1979).

based on a storehouse of arguably relevant information, than their peers educated along more permissive lines.

The availability of an option of intramural dissent or insurgency simply is not a necessary inference from an assumed value of individuality or distinctiveness.[12] A child can be "different" or "unique" in respects chosen by the child, and can display those qualities, on all or selected occasions, even if the classroom agenda-sharing option is foreclosed to the student. Not every broad rejection of *Tinker* logically implies totalitarianism. Being precluded from wearing a political armband in class does not preclude one from wearing such an armband elsewhere, thereby manifesting one's uniqueness, or from wearing one as an adult, after, if not before, the "due study and preparation"[13] valued by John Stuart Mill. Partisans of the value of individual self-realization or autonomy should recognize, as well, that such a value, however reasonably broadly conceived, may not do all the work expected of it in other respects. Autonomy does not necessarily require a particularly broad ranging education, or exposure to a nearly infinite set of ideas, or the ability to think constructively within all such areas.[14]

Finally, it should be noted that a high percentage of the litigated cases, perhaps not surprisingly, fail to implicate significantly the value of individual autonomy for another reason. In *Tinker*, the petitioners were sixteen, fifteen, and thirteen years of age at the time of the political expression in question,[15] and apparently were, quite naturally and understandably, deeply influenced in this regard by their own highly motivated parents.[16] This is not to suggest that speech with clear causal motivations must be constitutionally trivial, but that merely reflecting, in some less developed, less articulate way, the convictions or example of one's parents is no more evidence of the child's individual autonomy than would be the child's acting, more or less reflectively, on the basis of lessons imparted or inculcated through school.

A similar analysis may be made of the separate value or purpose of the free speech clause that invokes the importance of democratic self-government and the participation in that process.[17] Given the range of curricular, extra-curricular, and non-school vehicles for a child's developing the social, cognitive, and forensic skills necessary to prepare the child in a minimally adequate way, the school system can easily argue that to effectuate this value it will virtually never be required to allow the child to unsolicitedly speak her mind on any particular current social issue. Ultimately, collective self-government is perhaps a crucial political aim of the public school educational process.[18] This does not explain, however, why a Court that ordinarily professes deference on matters of the practical soundness and efficacy of educational practices should assume, without constitutionally permitting local experimentation, that the best overall practical preparation for each child's future participation in self-government as an adult,

12. *Cf. id.* at 347 (seeking to tie individuality to the possibility of defiance of authority).

13. J.S. MILL, ON LIBERTY 275 (B. Wishy ed. 1959).

14. *See* Gardner, *Liberty and Compulsory Education*, in OF LIBERTY 109, 126 (A.P. Griffiths ed. 1983).

15. *Tinker*, 393 U.S. at 504.

16. *See id.* at 516 (Black, J., dissenting).

17. *See, e.g.*, Garvey, *supra* note 11, at 338.

18. *See, e.g., Fraser*, 106 S. Ct. at 3164.

must involve in some primitively analogous way, broad free speech rights as a school-child.

There is certainly unassailable logic to the recognition that " '[i]t would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play an essential role in preparing their students to think and analyze and to recognize the demagogue.' "[19] We may stipulate that parents, along with institutions other than schools cannot discharge this burden alone, at least in certain respects. But it is simply not credible that a student's later-manifested ability as an adult to cast an intelligent vote, intelligently discharge the obligations of citizenship generally, or exercise reasonably fully and unconstrainedly, what we have referred to as fully developed free speech capacities, depends upon the student's being granted the initiative and latitude implied by *Tinker* and its progeny. Or so a school system might quite reasonably conclude. A school might reasonably determine that a student's future prowess in demagogue-recognition, or in intelligent exercise of free speech rights generally, depends significantly not upon *Tinker*-type activities, but upon such mundane capacities as the ability to draw in an analytical, incisive way, upon a reasonably rich storehouse of presumably basic historical and social factual knowledge, data, and theories.

Of course, freedom of speech is often thought to have underpinnings not only in the value of self-governance, but in its "truth detection" or "truth attainment" function.[20] In this regard, Justice Black urged that "[t]he original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders."[21] However curmudgeonly we may regard such pronouncements, it could reasonably be concluded that the wearing of armbands by the protestors in *Tinker*, aggregated across thousands or millions of sympathizers, would not have materially furthered our collective insight into the practical or moral dimensions of the Vietnam conflict, or otherwise given us access, potentially, to some "truth" about the conflict that we as a society did not already possess. This is partly because children tend to not be at the cutting edge of truth or insight into geopolitical issues, even of complex moral dimension, and partly because armbands, for example, tend, by virtue of their very nature, not to be very detailed, articulate, convincing, or "insightful." Hence, they are severely limited as new truth-conveyance devices, or as articulate challenges to received wisdom. Much the same could be said of most of the other familiar media of symbolic political protest.

One writer, paralleling the democratic self-government function argument, while conceding the normal immaturity of judgment of minor children, has maintained that "[g]uaranteeing the child's right of free speech . . . plays an instrumental role in advancing the search for knowledge and truth; the benefits do not accrue immediately, but neither can they be secured by sheltering the child until he is ready to join the adult community."[22] We have addressed the analogue of this argument in other contexts above, and we need not recast those

19. Seyfried v. Walton, 668 F.2d 214, 220 (3d Cir. 1981) (Rosenn, J., concurring) (quoting James v. Board of Educ., 461 F.2d 566, 574 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972)).

20. *See, e.g.*, Emerson, *supra* note 4, at 878-79; *see also* J.S. MILL, *supra* note 13.

21. *Tinker*, 393 U.S. at 522 (Black, J., dissenting).

22. Garvey, *supra* note 11, at 344.

arguments at this point. Suffice it to say that disagreeing with the result in cases like *Tinker* does not commit anyone to relevantly "sheltering" the student. The fallacy involved is in assuming the indispensability of the early and arguably superficial mimicry of a practice if the practice is ever to be later grasped as an adult. Our society does not mandate, for example, that because we want an ample supply of competent physicians in the future, we must now allow young schoolchildren to attempt or simulate simple actual diagnosis and treatment, perform fake or actual surgeries with appropriate safeguards, or prescribe (harmless) drugs, and so forth. Instead, we teach the young schoolchildren, who must in some proportion later become physicians, solely through basic education, acquisition of basic social skills, and through the authoritative inculcation of the principles of biology, chemistry, and so forth.

Thus, taken in this context, it is simply not true, or a reasonable democratically elected school system might well suppose it not to be true, that it is "crucial that the student learn by taking part in actual disputes that count for something."[23] Presumably, however, most defenders of broad free speech rights of public school students will have little general use for an "actually counting" standard; our natural impulse may be to say that many or most student elections that such persons would want to see broadly protected with respect to student speech do not actually "count for something" in any relevant sense.

In sum, it appears that the values underlying the free speech clause are, in this particular context, served at least equally and as well by non-school experiences and by school experiences, including listening to and speaking with fellow students, not dependent upon the kinds of student speech rights argued for or extended in cases like *Tinker*. Even if this were not so, it remains true because of age and immaturity that "[t]he ability of the child to influence the actions of the state through the political process and to reshape his own life as a result of information obtained through the first amendment is severely limited."[24]

II. TOWARD A SIGNIFICANT IMPAIRMENT OF RELEVANT CAPACITY STANDARD

While many of the student speech cases have been influenced by the metaphor of the classroom as peculiarly the "marketplace of ideas,"[25] we have seen that much or all of the value logic underlying that metaphor, is simply not necessarily and significantly implicated by many litigated speech restrictions imposed on public school students. Moreover, free speech values can be as fully recognized and effectuated despite, or even because of, those restrictions.

We have thus far no reason to question the constitutionality of the view that "[t]he student and the student's parent should be able to feel that the schoolroom will not be bombarded by unsolicited and unplanned events, ideas, and activities."[26] While student speech, for example, asserting that a principal is a liar or a racist may, controversially, serve some useful educational function in

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23. *Id.* at 361.

24. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 488-89 (1981).

25. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356, 1365 (9th Cir. 1985), *rev'd*, 106 S. Ct. 3159 (1986).

26. Diamond, *supra* note 24, at 493.

certain respects,[27] not all such speech acquires constitutional protection through its mere arguable utility, even if its utility bears upon recognized free speech values. On our view, then, there may be merit to according recognition and weight to the possibilities of non-physical disruption or distraction in a school or classroom.[28] Therefore, loss of authoritative control of the educational agenda, assuming a legitimate state interest in preventing such loss, need not be constitutionally mandated in *Tinker*-type situations. But there must of course be limits, drawn from the free speech clause, to the authority of even democratically elected school officials to keep their students in blissful ignorance, to maliciously or complacently flout or ignore free speech values, or to impose a thoroughgoing tyranny within a public school system.

The logical standard to impose in public school speech cases involving minors stems from the conclusion that while the speech of minors in *Tinker*-type cases does not significantly and uniquely implicate recognized free speech values, it is axiomatic that comparable sorts of general restrictions imposed on adults in general would clearly implicate such free speech values, and normally would be justifiably struck down on free speech grounds. As we will discuss at greater length below, there is plainly something constitutionally distinctive about adult status and adult activities pertaining to free speech. The free speech standard imposed within the public schools should accommodate that important difference. It should aim at preserving, for the future adults that the young students will eventually become, the range and depth and value of the free speech rights that such future adults might choose to exercise.

We thus argue for a "significant impairment of relevant capacity" standard. By this we mean that school officials should, under the free speech clause, be liable in principle for the presumably rare instances in which a school system, through action or inaction, has the proximate effect of significantly impairing or "stunting" a student's development, which it is instead constitutionally bound to reasonably assist. It is the school system's duty to further such students' social, intellectual, forensic, and other capacities necessary to or constitutive of the overall capacity to make reasonably effective use of an adult's free speech rights. Taken together, such capacities can be referred to simply as a person's "free speech capacities."

We require "significant" impairment partly to reduce indirectly obvious measurement problems. We are proposing, in effect, that a child be given a cause of action for what she will be like several years in the future, unless somehow perhaps rescued or restored and reclaimed. For practical reasons, we perhaps may want to toll the statute of limitations in such cases at least until the plaintiff's adulthood. These practical problems appear neither insurmountable, nor without broad precedent in areas such as personal injury tort law or the law of damages measurement.

While "impairment" implies a relational standard, or at least a comparison to some actual or hypothetical unimpaired condition, recognition of significant impairment in free speech capacities does not seem deeply metaphysical or even unduly complex. It is largely a matter of common sense and common observation. In the case of otherwise normal, healthy persons, unimpairment in our

27. *See* Nahmod, *Beyond* Tinker: *The High School As An Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278, 287 (1970).

28. Note the analysis of the case facts in *Tinker*, 393 U.S. at 517-18 (Black, J., dissenting).

sense is essentially a matter of some reasonable, reasonably broad, adaptable fluency and skill in the free speech capacities. It is exemplified in such activities as gathering information, reasoning, reflecting and judging, and in forming and modifying principles and conclusions, as well as in persuading others, as compared with the level of comparable skills exhibited in the real world or on test scores by the broad range of one's peers, who have experienced the range of contemporary public and private educational systems. In the case of students who have been educated in more than one school district, each district individually should bear responsibility for not irresponsibly certifying the student for the next grade level in the absence of the student's having the free-speech capacity skills minimally appropriate to the grade level in question.

We have not insisted, as constitutionally mandated, upon the public schools' maximization or optimization of the development of their students' free speech capacities, manifested later, as adults. The maximization standard would controversially exalt the free speech clause above other, arguably equally constitutionally fundamental values, and might require some unnerving costs and tradeoffs. The "optimization" standard, while in one respect unassailable as a matter of abstract logic, would seem practically unascertainable and unenforceable judicially. If we retreat to "rough optimization" we have returned to a zone-of-reasonableness standard.

Among the features and implications of this standard is its focus on effects, and not on the difficult to prove, and often irrelevant, motivation, intent, or purpose of the school in imposing its speech restraints. If the effect is one of relevant significant impairment, the school's purpose is of limited interest.[29] This follows not just from the language and logic of the free speech clause, but specifically from the fact that free speech values can be damagingly impaired in the absence of any sort of malice.

More importantly, this standard can presumably be met even though the school system, whether inevitably or maliciously, omits or otherwise "suppresses" classroom presentation or discussion of certain disfavored subjects or ideas. It is simply implausible to imagine that any student will necessarily suffer significant impairment in future free speech capacity because she was denied, until the age of majority, classroom exposure to some perspective on the New Deal, or fascism, or affirmative action, and where she would not have suffered such capacity impairment had she been so exposed. Of course, certain content-based or viewpoint-based omissions or other curricular choices—for example, professions of racial supremacy—may raise or avoid issues of independent constitutional rights, including that of equal protection of the laws for all students. Similarly, we treat establishment clause and free exercise of religion questions as without significant impact on our major theses.

The questions of socialization and indoctrination, of value inculcation, and of coercion, are important in our context, and are discussed below. It must be admitted at the outset, however, that our future capacity impairment test seems compatible with at least some limited attempt on the part of the school system to undertake the occasionally constitutionally suspect goal of fostering a "homoge-

29. *Cf.* Justice Blackmun's concurrence in the library book removal case of Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 879-82 (1982) (focusing on the school authorities' intent in removing the books) and the discussion of Justice Blackmun's approach in Levin, *supra* note 10, at 1659.

neous" people.[30] But there are limits to the school's authority, independent of any separate equal protection challenge. On our theory, the homogenization of minor public school students, whether intentional or inadvertent, may not take the form of, or lead to, significant future capacity impairment of the kind we have described.

Without delving immediately into the broader issues of coercion and indoctrination, it is possible to differentiate quickly our view from the theory that courts should interfere with public school officials' curricular or instructional choices "only in those rare instances when decisions of state and school officials are based upon narrow political, partisan, or religious considerations."[31] Religious issues aside, our focus would instead be on the possibility of significant future free speech capacity impairment in the absence of this sort of narrow partisanship. Such capacity impairment does not become constitutionally permissible merely because it reflects some neutral, even-handed inadequacy on the part of the schools.

On the other hand, it might be wondered whether all narrowly politically motivated instructional decisions should be vulnerable under the free speech clause if there is no relevant capacity impairment, no equal protection issues, and no religion clause problems. It should be noted that narrow indoctrination need not be effective, and even if temporarily effective, need not be permanently so, or leave some permanent detectable impact.[32] Effects of narrow classroom partisanship, other than generating undesired widespread skepticism and debate outside of class, may essentially "wash out" by the time of adulthood, the earliest time, on our theory, for full and independent free speech significance. If such effects do not so wash out by the constitutionally relevant moment, the analysis moves to that of considering whether any relevant capacity impairment is present.

This is not to suggest that the rights of students or parents under the religion or equal protection clauses never impinge upon a free speech analysis, on our theory. Were a public school to even covertly communicate an agenda of, say, racial hierarchism, this would be subject to objection not only on the basis of the fourteenth amendment's equal protection clause,[33] but on grounds relevant to our free speech analysis. We might draw, in at least a loose way, on the judicial sociology of cases such as *Brown v. Board of Education*[34] for the proposition that such "teaching" may have the long-term effect, whether intended or not, of dampening or impairing the development of the future free speech capacities of disfavored and subordinated groups of students.

Similarly, it is intriguing to ask, the religion clauses utterly aside, about the free speech status of a public high school that, standing the case of *Wisconsin v. Yoder*[35] on its head, insisted on teaching its students only in accord with the

30. *Cf. Tinker,* 393 U.S. at 511 (repudiating such a policy goal). *See also* Diamond, *supra* note 24, at 481.

31. Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis,* 12 HASTINGS CONST. L.Q. 1, 49 (1984).

32. *Cf. id.* at 52. (recognizing the dangers of indoctrination, but not discussing the possibility of the fading or superseding of such influence over time).

33. *Cf. id.* at 55 (discussing the inculcation of doctrines of racial hierarchism).

34. 347 U.S. 483 (1954).

35. 406 U.S. 205 (1972).

secular implications of Old Order Amish doctrine. There is at least some support in the descriptions of those tenets in *Yoder* for contrary views as to whether such a regime would violate a student's free speech rights on our relevant capacity impairment test. No significant such impairment need follow if such a school were merely to emphasize self-reliance and manual work, and to de-emphasize, as opposed to largely ignoring, "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students."[36]

But plainly, to proceed too far in this direction, or to "insulate" students "from the modern world"[37] risks largely disabling students in relevant respects, and making their stance of aloofness and political silence an involuntary one. To go this far is to fail the free speech test we have proposed.

III. THE NATURE OF CHILDHOOD EDUCATION AND CHILDREN'S SPEECH RIGHTS

While there are many questions yet unanswered, a tentative conclusion that may be drawn is that just as a parent's forcing or indoctrinating the minor child to wear a protest symbol to school would not, ordinarily, be significantly destructive of future free speech capacity,[38] neither, ordinarily, would a contrary requirement by the public school that the child not wear such a symbol to class. Conclusions of this sort are best reconciled on the basis of the recognition, subscribed to by a majority of the Supreme Court in at least some contexts,[39] that public school education is not simply a matter of the Romantic, spontaneous, unaided natural blossoming of latent abilities, but is largely characterizable as a period of broad preparation and value transfer.

Even in the *Tinker* case itself, Justice Stewart in his concurring opinion sought to hold open the possibility of drawing crucial distinctions between adults and minor children.[40] He did so on the grounds of the permissibility of a state's determining that the latter are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[41] This formulation is undoubtedly on the right track, but there is a certain unsatisfactoriness with it in that such schoolchildren are undeniably possessed of a full and richly developed capacity for vehement, if occasionally grossly immature and insensitive, choice and expression of preference.

Perhaps one social point in frustrating the preferences of schoolchildren to "speak" politically in class, at least on some occasions, is to ensure that there are first imparted important lessons in perspective, diplomacy and tact, dispassion-

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36. *Id.* at 211.

37. *Id.* at 210.

38. *Cf.* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605, 646 (discussing the rights of parents to exercise control in this respect over their children).

39. *See, e.g., Fraser*, 106 S. Ct. at 3164.

40. Professor Tushnet maintains that, with specified qualifications, "[t]he first amendment rights of young adults in schools are, according to *Tinker*, exactly the same as those of adults." Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 ILL. L. FORUM 746, 760.

41. *Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (quoting Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in result)).

ateness in analysis, and the potential range and depth of relevant evidence when making political choices. This would include such matters as the admittedly non-disruptive, but potentially harmful, "wounding" effect of speech on some of one's fellow students, on emotional subjects, even if the speaker has not intended such an effect. It should be uncontroversial that "[w]ithout any formal schooling, children will be incapable of intelligently exercising their civil or political rights within our society."[42] Relatedly, "[c]hildren develop from incapacity toward capacity."[43] The practical order of things is one of childhood incapacity to exercise free speech rights until capacity is developed, as children "are not adults in miniature"[44] even for our purposes. The burden of showing impairment by the school, of otherwise flourishing capacities, naturally rests on the claimant.

On our theory, minor students are in the relevant respects not finished products, but radically undeveloped.[45] This is not to suggest that children are not ends-in-themselves for ethical purposes. Even children may suffer unjustifiable affronts to their moral dignity. But childhood, particularly in the school context, is a stage of crucial preparation, with a sense of essential preliminariness. As we have seen, in matters of free speech, any rights of the student exist to "point toward" those of the future adult.

Of course, there is a certain roughness in choosing, as we have, either attaining the age of majority or graduation from high school as the appropriate boundary markers. But there is a clear conceptual logic to these lines of demarcation,[46] and we may well not wish to pay exorbitant administrative costs associated with more precise, individualized determinations of the emotional, social, moral, and intellectual development of student plaintiffs, or potential plaintiffs.[47] It is of course possible to argue that there is some better dividing line, such as entry into high school, or entry into one's senior year in high school, even if it is recognized that the privileged speech of persons in the more mature category within the school may tend to unpredictably affect younger attending the same school. The argument has been made, as we noted above, that "[r]ealistically, high school students are beyond the point of being sheltered . . . ."[48]

Literally, the argument appears to be that high school students are practically unshelterable. This is implausibly extreme. A high school might well be reasonably effective in banning the wearing of offensive insignia. If instead the argument concerns the desirability of some degree of such sheltering, then it repeats claims confronted throughout this Article. If there is in fact a babel of voices, some unruly and irresponsible, outside of school, it does not follow, as a

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42. Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 PHIL. & PUB. AFF. 338, 349 (1980).

43. Hafen, *supra* note 38, at 648.

44. *Id.* at 651 (quoting J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 13 (1973)).

45. *Cf. Fraser*, 106 S. Ct. at 3165 (discussing the need for appropriate examples and role models for children in schools).

46. Professor Levin has discussed several cases in the establishment clause area that contrast the presumed maturity and skepticism of college students with the presumed greater impressionability of high school students. *See* Levin, *supra* note 10, at 1678 n.164.

47. *See* Tushnet, *supra* note 40, at 750.

48. *Fraser*, 755 F.2d at 1363, *rev'd*, 106 S. Ct. 3159 (1986).

constitutional requirement, that a public high school may not seek authoritatively to achieve a somewhat different mix and range of voices within its walls without defaulting on its obligation to prepare students for the world outside.

The alternative dividing line of senior status in high school is suggested by the remark of Judge Rosenn to the effect that:

> A decision to limit the exposure of young adolescents, who have less developed critical skills, to works such as *Mein Kampf*, which express an ideology that school administrators find abhorrent, should normally remain undisturbed . . . . The same would not be true if the students in question were high school seniors.[49]

This may be taken to recommend a dividing line between eleventh and twelfth grades, even if we are not to accord any "unlimited" exposure rights to the twelfth graders. The administrative burden on school officials at this point may be large, though, even assuming that the difference in the average level of critical skills between eleventh and twelfth graders is particularly significant, or that some particular threshold is ordinarily not passed until entry into twelfth grade.[50]

Precise boundary issues aside, the decisive relevance of age to the appropriate scope of liberty was recognized by John Stuart Mill in the context of his discussion of limiting governmental coercion to the prevention of harm to others: "It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties."[51] Mill continues to the effect that "[w]e are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood"[52]

The developed ability to reason and exercise self-control is arguably essential to the broader system of political freedom generally.[53] Those abilities depend upon age and education, including certain educational or curricular restraints that may be necessary for the child's free speech capacities to develop. While the untutored and the intellectually undernourished person may indeed be free from many constraints to do many valued things,[54] she must lack the presently reasonably developed capacity to exercise the range of skills that comprises the unconstrained exercise of freedom of speech.

Public schoolchildren are in this respect relevantly differently situated from adults, whether the adults in question are at liberty or under constraint. Age matters in the ironic sense that even where we recognize that a given adult is dramatically impaired in free speech capacities, due perhaps to illiteracy, we do not compulsorily arrange for such an adult to be placed, against his will, in a position where he can take more effective advantage of his free speech rights.[55] This is undoubtedly true largely for a variety of practical reasons, but also in

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49. *Seyfried*, 668 F.2d at 220 (Rosenn, J., concurring).

50. For a possible distinction in a somewhat different context between the first amendment rights of "older" versus "younger" minors or juveniles, see American Booksellers Ass'n v. Comm. of Va., 792 F.2d 1261, 1264 n.7 (4th Cir. 1986), *prob. juris. noted*, 55 U.S.L.W. 3569 (U.S. Feb. 24, 1987) (No. 86-1034).

51. J.S. MILL, *supra* note 13, at 251; Gardner, *supra* note 14, at 117.

52. J.S. MILL, *supra* note 13, at 251. *See also* Hafen, *supra* note 38, at 612.

53. *See* Gardner, *supra* note 14, at 112.

54. *See id.* at 114.

55. *See id.* at 109.

part because of respect for the dignity of choices made by a person of the requisite age.

It is certainly possible to analogize the status of public school students to that of prisoners,[56] even if prisoners are restrained in their liberties all of the time, unlike students.[57] From our perspective, the crucial disanalogy is that schools are or ought to be constitutionally required, in our contexts, to give crucial weight to the future capacities of students and to their development, or to the students' future selves generally, in loose analogy to a constitutionally required focus on their "rehabilitation" or rescue from initial ignorance and lack of competence, whereas prisons can ordinarily, and constitutionally, focus more exclusively on the prisoner's own past — the retributive and vindictive functions — or on the present welfare of third parties, as where a prisoner may, if released, pose an immediate threat to the safety of particular persons, or of society in general.

IV. THE CONSTITUTIONALLY LEGITIMATE FUNCTIONS OF THE PUBLIC SCHOOLS

There is an obvious, never fully resolvable constitutional tension between the public schools as an instrument in the process of intergenerational transmission of culture—the process of teaching—and the schools as potential sources of narrow, perhaps coercive, indoctrination causing negative effects that may continue into adulthood. Judicially, it has been maintained that "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."[58] Similarly, the Court has concluded that "public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.' "[59] Apparently, that process need not be confined to values explicitly prescribed by the Constitution. In *Pierce v. Society of Sisters*,[60] the Court, though certainly in dicta at best, undoubtedly saw nothing constitutionally amiss with a state requirement that teachers be of "patriotic disposition."[61] Presumably such a disposition would often tend to reflect itself in one's teaching, and perhaps even in one's grading of students.

Constitutionally, the public school need not be essentially an extension of parental control in the value inculcation process. It has been sensibly argued that "the public school system is not merely a mechanism that translates the will of the parent into the upbringing of the individual child; it is also a mechanism that instills in the child the collective societal values of the community."[62] On our theory, of course, the schools constitutionally must do more, perhaps to the

56. *See* Diamond, *supra* note 24, at 517 n.181.

57. *See id.*

58. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

59. *Pico*, 457 U.S. at 864 (1982) (plurality opinion) (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

60. 268 U.S. 510 (1925).

61. *Id.* at 534.

62. Diamond, *supra* note 24, at 494 n.86. For a discussion of the moral rights of children with respect particularly to their parents, see D. PHILLIPS, TOWARD A JUST SOCIAL ORDER 159-83 (1986).

detriment of the above goals. The schools must, for example, work to provide students with the eventual capacity to do such things as defend or oppose many of those parental and collective societal values.[63]

There is judicial authorization as well for an additional role for the schools. The Court has authorized value inculcation, at least within certain limits. We have argued for reading the free speech clause as mandating what might be called rights-exercise preparation. But relatedly, it has been contended that those who nurture and direct the destiny of the child have "the right, coupled with the high duty to recognize and prepare him for additional obligations."[64] We have not similarly emphasized any duty of preparation for future obligations, since our focus has not been on the possibility of overriding any prima facie speech rights of students by means of the school's showing an inconsistent compelling state interest not otherwise attainable. There is undoubtedly some overlap in concern, though, as it is doubtful that a person could discharge well the range of citizenship obligations if her schooling were such as to impair significantly her free speech capacities.

Our view thus falls between that adopted by two major contending camps. Those who accord relatively great latitude to school authorities have argued that "[t]he board, the principals, and the teachers may select a textbook favoring their own views and ideologies, and they might not permit alternatives."[65] This result may to some degree be simply unavoidable, but within the limits implied by our discussion above, it is permissible.

A variant of this latitudinarian approach argues for a constitutionally privileged status for inculcating "constitutionally recognized fundamental values while refusing to permit the study of beliefs contrary to those values."[66] Again, this may, up to a point, be permissible on our capacity impairment theory. But the practical and logical questions raised by this variant are intriguing. It can be argued, for example, that one unimpeachable constitutional value, in some sense, is the institutional process for the supersession and replacement of constitutional values, as in the supplanting of the equal protection values of *Plessy v. Ferguson*[67] with those of *Brown v. Board of Education*.[68] There is thus a paradox in pedagogically closing the class of constitutionally recognized values. If it is replied that both *Plessy* and *Brown* in fact uphold the same constitutional value, that of equal protection of the laws, then very little will count as a change in constitutional values.

On any of the latitudinarian theories, there must be some account of how one can clearly inculcate a particular favored value without simultaneously exposing the students to the value's opposite. The more serious problem for these theories, though, is posed by the other extreme to which our theory stands as a midpoint. The antithesis of the latitudinarian or inculcationist theories is constituted by writers who argue that "the courts have inadequately protected the interests of students in freedom of belief and have granted too much weight

63. None of this is to suggest, certainly, that the formal learning process is of only instrumental value, or that education is not worthwhile for its own sake. *Cf.* Gardner, *supra* note 14, at 127.

64. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), *quoted in* Hafen, *supra* note 38, at 620.

65. Diamond, *supra* note 24, at 497.

66. Freeman, *supra* note 31, at 56.

67. 163 U.S. 537 (1896).

68. 347 U.S. 483 (1954).

to government's claimed interest in inculcating and indoctrinating youth."[69]

This more restrictive approach is based on liberal principles and the observation that there are no uniformly acceptable political values.[70] In the absence of any universal current consensus on which values are genuinely fundamental democratic values, "to authorize government to inculcate 'fundamental democratic' values is to authorize those in power to pick and choose the versions of the values that serve their interests."[71] On this more restrictive approach, the courts should on principle bar any attempt by the public schools to impose on students any set of political ideas, values, attitudes, or beliefs.[72] The rationale underlying this approach is that a government that is to be subject to the genuine control of the electorate cannot have the authority to determine, partly through the public schools, the values and preferences of that electorate with respect to the government, lest democracy be merely a vicious circle.[73]

Rooted as such a conception is in one version of liberal individualism, one is tempted to respond to such restrictive approaches not on the level of its ethical soundness, but that of cultural anthropology. Is it not simply asking too much of any reasonably vital, self-assured, reasonably decent society that it be so remarkably different as to jeopardize its own perpetuation or its own continuity in even a general way by foreswearing an arguably vital means of political socialization? Will a society that is so scrupulously indifferent as to its advertisement to the succeeding generation not simply tend to be replaced on the world stage by societies less attractive by our own current majority's standards and most of our own received traditions? Particularly in light of a variety of private school options,[74] and in light of the relative uncontroversiality of certain basic political concepts, such as free speech for adults, the absence of an established church, broad civil tolerance, and opposition to explicit racism, we are naturally reluctant to grant a public school curricular veto to dissenters on such issues, beyond their ability to convince us of our error. On the strict logic of such a restrictive position, it cannot countenance the teaching, or "inculcation," if there is any difference, of the particular value of individual dignity. Not all subscribe to it. On our theory, such value inculcation is permissible, at least under the free speech clause, up until the point of significant future free speech capacity impairment.

There is, finally, for the restrictive approach to public school value transmission, the deeper practical problem of how a reflective citizen, reasonably open and unconstrained in her thinking, is actually produced. For an adult to be knowledgeable and critically insightful about her society, it may be that, contrary to what is permissible on the restrictive approaches, some degree of value inculcation as a schoolchild is practically required, permanent or not.

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69. VanGeel, *The Search for Constitutional Limits on Government Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 203 (1983).

70. *See* Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1134 (1979); *See also* Levin, *supra* note 10, at 1653 (discussing Professor Kamenshine's argument).

71. VanGeel, *supra* note 69, at 250.

72. *See id.* at 239.

73. *See id.* at 249-50.

74. Professor VanGeel cites a figure of 11% private school attendance as of 1983. *Id.* at 283 n.386.

Professor Ackerman has assumed, quite plausibly, an infant's practical need for "cultural coherence."[75] Moreover, perhaps at some loss in obvious plausibility, it seems that a public school education in social matters that is, simply an unordered, kaleidescopic presentation of a succession of views, theories, and unendorsed value assertions, without any authoritative context, may tend to leave the student simply dismayed, without any coherent standpoint at all — not even a reflective, well-articulated relativism or skepticism. If so, it seems that the restrictive approach to value inculcation, which of course might also take the chimerical course of attempting to utterly exclude all values from the school, might itself be unconstitutional on our theory, as resulting in significant free speech capacity impairment. Relatedly, it should be noted that sanitizing the schools of all illicit value communication, even if this were possible, would for another reason not inevitably lead to an unquestionable enhancement of the child's autonomy and political freedom.[76] Certainly, some parents are themselves afflicted with something of the dictator's ambitions[77] and lack of self-doubt. To diminish the value enculturation aspects of public school education may be to dispose of a rival of and countervailing influence upon such would-be dictators.

The Supreme Court has recently shown signs of limited movement on the scope of the legitimate functions of the public schools. In *Bethel School District No.403 v. Fraser*,[78] for example, the Court's majority was willing to itself characterize the respondent speaker's remarks at a school assembly as offensively lewd, indecent, and vulgar, even if not obscene.[79] The Court might, in a less judicially assertive moment, have relied more heavily on the reasonableness of such a characterization by school officials themselves, but it at least avoided the relativism with which it has, ineptly or not, decided other free speech cases in the past.[80] In *Fraser*, the majority, finding offensiveness along with an absence of political viewpoint discrimination, determined a sexually suggestive high school assembly speech to be constitutionally unprotected against the school officials' determination that such a speech would, or did in fact, "undermine the school's basic educational mission."[81]

It is possible that a future Court might drive a wedge between the essentially physical disruption standard and the potentially broader "undermining of basic educational mission" language in *Fraser*. The ideal test case would involve non-lewd, non-indecent, non-vulgar speech or symbolic conduct that could reasonably be thought to detectably undermine the school's basic and legitimate educational mission, while at the same time not posing a substantial threat of an actual physical disruption, i.e., a pure educational agenda control case.[82]

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75. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 141 (1980).

76. *See* Hafen, *supra* note 38, at 650.

77. *See* B. ACKERMAN, *supra* note 75, at 156.

78. 106 S. Ct. 3159 (1986).

79. *See id.* at 3166.

80. Cohen v. California, 403 U.S. 15 (1971), is a familiar example of the Court's invocation of the undoubtedly true, but arguably irrelevant, observation that different people find different speech offensive or distasteful.

81. *Fraser*, 106 S. Ct. at 3166.

82. One additional legitimate school function worthy of mention is that of promoting lawabiding behavior among the students. *See* San Diego Committee Against Registration and the Draft (CARD) v. Governing Board, 790 F.2d 1471, 1479 (9th Cir. 1986). In *CARD*, the Ninth

V. THE PRESERVATION OF FUTURE OPTIONS FOR THE CURRENT STUDENT

In a slightly, different context,[83] it has been judicially observed that:

> A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past.[84]

Our focus, in the matter of option provision or non-preclusion, of course extends beyond recognizing such as merely a legitimate state interest and considers the extent to which option provision through education rises to a constitutional requirement derivable through the free speech clause.

In practice, there will be substantial overlap between a policy of providing future life style options for students and a policy of ensuring no significant impairment of future free speech capacities. These requirements are certainly not identical in principle, as we can envision a person who can assume a variety of less-demanding life roles without being capable of deploying unconstrainedly a range of free speech-relevant capacities with reasonable fullness. Whether our capacity impairment standard is more demanding, overall, than a principle of preserving life style options is partly a matter of definition, and partly a matter of empirical investigation.

While it is similarly possible to assert that a high school graduate with a stunted, apparently permanently impaired free speech capacity is or may be a "good citizen,"[85] it is certainly possible to extend the notion of good citizenship to encompass more than merely not being a criminal, or voluntarily accepting a status as a public welfare burden,[86] by including a good citizenship requirement of at least preserving one's option for intelligent, adaptable political participation.[87] Arguably, from the standpoint of society's interest in good citizenship, as well as from that of the individual student's own present and future interest in her future free speech capacities, "it is worse to restrict children's future opportunities against their will[88] than it is to force them to keep their future options open."[89] This follows in part from the relevant differences between schoolchildren and adults discussed above.

Circuit found the threat of future illegal conduct by students in failing to register with Selective Service to be too speculative to justify the school's exclusion of CARD materials. Actually, the school's interest in this case should probably have been analyzed as the less speculative aim of not abetting or cooperating with what it may have reasonably assumed to be an actual purpose of the CARD organization of counseling failure to register. For an even more recent case with substantial agenda-control features, see Burch v. Barker, 651 F. Supp. 1149 (W.D. Wash. 1987).

83. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

84. *Id.* at 240 (White, J., concurring).

85. *Cf. id.* at 212 (discussing desire of Amish to be good citizens, though at a level compatible with modest education).

86. *Cf. id.* at 224-25 (noting absence of evidence of any Amish tendency to become social burdens).

87. *Cf. id.* at 221 (discussing Jefferson's linkage of political participation and good citizenship). Understandably, it has been argued that the educational standards set by the Court in *Yoder*, may be too low to promote later "meaningful choice" in democratic society. *See* Gutmann, *supra* note 42, at 356.

88. Or even in accord with it, arguably.

89. Gutmann, *supra* note 42, at 355.

How far we extend the principle of option preservation depends, though, on whether we emphasize the societal interest or the individual rights interests of each particular student. There is a lurking ambiguity in the claim that "[t]he value of a liberal democracy to its citizens is in large part contingent upon the ability of its citizens to exercise their political rights intelligently as well as to choose among alternative conceptions of the good life."[90] A liberal democracy can function effectively, and confer value on all persons, as long as the percentage of persons educated "to full and equal citizenship"[91] does not fall below some minimum. Various students may be deprived of their free speech rights, in view of their adult free speech incapacities, with the collective goal of liberal democracy still being realized, if in obviously imperfect measure.

Interpreted stringently, the individual child's "right to an open future"[92] is in some respects broader in its requirements than our interpretation of the free speech clause in terms of future free speech capacity impairment. On a demanding interpretation, it is possible to assert that it is in some measure the responsibilty of, for example, the El Paso public system that most El Paso public school students are never in a position to take a particular major world religion like Shintoism seriously as a possible future life option. It remains possible to reconcile these standards either by interpreting the child's right to an open future less strictly, or by determining, implausibly, that the practical inaccessibility of Shintoism must reflect a significant impairment in relevant free speech capacities.

VI. Coercive Indoctrination and The Public Schools

It follows from our theory, perhaps controversially, that a government may be guilty of an *attempt* to restrict a student's free speech rights impermissibly, without succeeding in the attempt, and therefore, despite all the malice in the world, not have violated the students' free speech rights. This is familiar in other contexts. That killing someone may amount to the crime of homicide does not in and of itself mean that an unsuccessful clear attempt to commit homicide must necessarily be a crime, let alone the crime of homicide.

Similarly, on our theory, if the government has been sufficiently ineffective in its attempt to violate student free speech rights, or if its actions without such a suppressive intent are similarly inconsequential, there simply is no actionable free speech violation. Moreover, it becomes possible for a potential intended or unintended violation of a student's free speech rights to "turn out" to be not actionable because any immediate effects may become neutralized over time, leaving the student's free speech capacities unimpaired when she reaches adulthood.

This temporal dimension, in which putative free speech violations may dissolve, is also not unfamiliar. We do not charge someone who pays in advance for a future murder with any kind of homicide if, for some reason, the person he

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90. *Id.* at 350.

91. *Id.* at 351.

92. VanGeel, *supra* note 69, at 261. Of course, an unduly strenuous interpretation of this principle may run up against the fact that apparently any recognizable public school system would tend, if only inadvertently, to effectively close off certain otherwise viable life alternatives through their "hidden curricula" and unavoidable fostering of particular values. *See* Gutmann, *supra* note 42, at 352.

has paid to commit the murder is somehow prevented from carrying out his contract. But the analogy to "attempted" free speech violations, which may even appear "successful" temporarily, is often underrecognized. It has been urged, for example, that "the state may not attempt to coerce belief by the child, because it would thereby abridge future freedom of choice."[93] But on our theory, this would not necessarily follow, even if "attempt to" were omitted, and the focus only on successful attempts. Attempts to coerce belief may completely backfire, or otherwise go awry. They may also be merely partially or temporarily effective such that no significant impairment of free speech capacities is apparent once the child reaches the age of majority or leaves the school.

A coercively inculcated belief is therefore not necessarily a long-term or undislodgeable belief. This is significant because, on our theory, the free speech capacities of adults are far more constitutionally significant than those of the same adults as schoolchildren, and the first amendment forbids precisely the abridging of free speech rights, which literally excludes failed attempts to abridge those rights from the scope of its coverage.[94]

Unless one simply defines coercive inculcation of beliefs in terms of future option closing, a uniform objection against all such coercion by the public schools[95] raises difficult empirical questions. Is it even possible for a society to resist the understandable temptation to simply implant basic beliefs or attitudes within the minds of its public schoolchildren, bypassing or simply not waiting for the critical reflective capacities of such children? Is it perhaps true that some or all children in fact require some minimal anchoring in basic beliefs not fully critically examined if they are to develop a reasonably effective critical intelligence? Is there perhaps some tradeoff between minimal coerced inculcation of belief as a child and later resistance as an adult to propagandizing? More exotically, is it possible that one coercive childhood experience may "offset," or be offset by, another such experience?[96]

In any event, it seems clear from casual observation that persons may be both reasonably free speech competent as adults and yet have been subject to evidently permanent, coercive, reason-bypassing indoctrination as a schoolchild. Any normative theory to the effect that any non-rational indoctrination of schoolchildren violates the free speech clause[97] should confront not only the empirical issues raised immediately above,[98] but the limited relevance of genuine autonomy concerns to schoolchildren, in light of their not yet developed capacities, and their dependence on the no more autonomy-respecting process of socialization through parents.

Our view of the legitimate role of educational coercion might also be con-

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93. Garvey, *supra* note 11, at 350.

94. It might be argued that a government that once, or repeatedly, sought unsuccessfully to abridge a person's free speech rights, at some cost to that person, was violating the person's right to equal protection of the laws.

95. *See* VanGeel, *supra* note 69, at 253, 261.

96. See B. ACKERMAN, *supra* note 75, at 159, for a discussion of the possibility of what might be called countervailing intolerances.

97. *See* VanGeel, *supra* note 69, at 261, Garvey, *supra* note 11, at 327.

98. Not entirely frivolously, it might be asked why compulsory public school courses in mathematics do not tend to coercively inculcate values associated with "mere linear rationality" that may well not be uniformly shared by parents of public school students.

trasted with the broader view espoused by Professor Ackerman, who argues that adults may coercively inculcate certain adult norms if such is necessary to minimize the probability or severity of criminal law restraints being required to control the child later.[99] This broader view, despite its undoubted libertarian intent, might of course in principle be used to justify an unexpected degree of counsequentialist state intervention into such matters as the watching of television violence. Our focus is narrower in that preventing future criminality by even the least intrusive means may license more intrusive restraints than our requirement of the preservation of future free speech capacities.

Judicially, there have been attempts to distinguish between a school's instilling values through "choice of emphasis" on the one hand, and by "shielding" students from disfavored ideas on the other.[100] Alternatively, it has been urged that "[s]chool boards may establish their curriculum in such a way as to transmit community values . . . but . . . may not deny access to ideas in a way that prescribes an orthodoxy in matters of opinion."[101] Tests such as these may have some sorting power, but they quickly become merely alternative ways of characterizing essentially the same phenomenon[102] or educational technique. Under our capacity impairment test, as we have seen, some degree of "shielding" may be permissible under the free speech clause, while it is possible that broad and extreme "emphasis" may sometimes not.

The Court has also shown some attraction for an argument in the following terms: "That [the schools] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[103] At least the last clause of this sentence is supported by Dean Levin, who argues that "if the educational institution is wholly undemocratic, students are likely to get mixed signals with regard to the democratic values needed to function as citizens in our society: The way in which school administrators operate schools may have a more powerful influence on students than the lessons in their civic textbooks."[104]

The strangulation argument, at least at a literal level, overlooks the possibility that a school may reasonably presume that, despite the absence of governmental hinderance or constraint, an untutored, undeveloped mind is essentially not yet a politically "free" mind in the relevant sense. And that a young student eventually may take most significant advantage of her free speech rights as an adult only if she is subject to broad, reasonable restrictions on her present inclinations as a child to do such things as engage in political protest, or its semblance, during class.

Similarly, while we obviously do not want to preach the value of free speech

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99. *See* B. ACKERMAN, *supra* note 75, at 147-48.

100. *Pico*, 457 U.S. at 882 (Blackmun, J., concurring in part and concurring in the judgment).

101. Bell v. U-32 Bd. of Educ., 630 F. Supp. 939, 944 (D. Vt. 1986).

102. An interesting test case would be a school system that implicitly "prescribed," allegedly, an "orthodoxy" of some of patriotic feeling or opinion, in ways that avoided the dramatic spectacle of coerced flag salutes by those objecting on religious grounds, as in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

103. *Id.* at 637, *quoted in Tinker*, 393 U.S. at 507 and *Pico*, 457 U.S. at 864-65 (plurality opinion).

104. Levin, *supra* note 10, at 1649.

and political democracy to children while hypocritically violating those principles in our classroom dealings with them, we must not simply beg the issue by assuming that free speech in the schoolroom should be analyzed along the lines of free speech in the union hall, or on the picket line, or that democracy in a classroom must extend as far as it might in other institutional contexts. We must discern the scope of children's free speech rights—the point at issue—before knowing whether we are setting a bad example, or simply adhering sensibly to the purpose-driven legitimate scope of those principles. There may be relevant distinctions to be drawn between minor children in a public school and adults generally.

VII. THE SCOPE OF THE STUDENT'S RIGHT TO KNOW PARTICULAR THINGS

Our theory includes some free speech clause limitations on the unwillingness of schools to instruct. But it is reasonable to ask whether a student could ever have a free speech right that certain identifiable facts, principles, theories, or values be taught to him. One possible answer is that "[t]he right to know should not impose an affirmative obligation on the state to provide specific information; the better role for free speech is to restrict attempts by the state to coerce belief or to forbid the acquisition of knowledge. Affirmative provision of information seems better left to parents."[105]

The analysis is a bit different, however, under our theory. It seems correct that there is no general constitutional right of public school students under the free speech clause to specific, identifiable bits of information or perspectives. But there is an obvious free speech basis, under our significant future free speech capacity impairment test, for requiring the school to impart some broadly content-variable irreducible minimum quantity and variety of arguably basic information, theories, and viewpoints. The school may not simply assume that this minimum nutrition for developing free speech capacities is coming from some other source, such as the family.

There may, as an empirical matter, be some particular ideas that seem so fundamental and inescapable that the school's failure to in any way present them, even briefly, may be most plausibly explained on the basis of the school's desire to impair, or its indifference towards the impairment of, free speech capacity development.[106] The idea of the very existence of the United States as a nation-state would seem to fall into this category. Another such individually necessary particular idea may be that adult Americans are widely thought to hold, descriptively or normatively, defensible free speech rights. It is difficult to imagine some set of different ideas which, if conveyed to the student, would sufficiently compensate for the absence of the above ideas. Under our theory, therefore, there is probably some limit to the variability of the various sets of basic ideas, that when imparted to the student will suffice to avoid the relevant capacity impairmment, which supplies in turn a principled limitation on the

105. Garvey, *supra* note 11, at 374.

106. *Cf.* Levin, *supra* note 10, at 1660, 1666 (discussing limitations on the discretion of teachers in selecting ideas to be presented).

scope of the student's free speech right to know particular things.[107]

It is possible to seek to expand the student's free speech right to know particular things by appealing to the fact that motivation enhances learning, and that some matters, such as sex in general, are of greater intrinsic interest to schoolchildren than other matters.[108] But as fascinating as such subjects may be, as indicated by the ample time devoted to them by adolescents outside of class, it may be difficult to show significant future free speech capacity impairment because of the exclusion of such particular matters from the curriculum.

An individual school might plausibly maintain that it prefers to impart the lessons that interests and tastes in conversational subject matter need not be brute, but can be cultivated. Or it may teach that classroom discussion of such matters undermines the importance of developing dispassionate, impersonal analytical and expository skills that draw upon statistical, rather than anecdotal or introspective evidence. It is far from clear, as we shall discuss further below, that the federal courts should be in the business of simply second-guessing such pedagogy in the absence of other legal considerations.

An interesting variant of the particular item of knowledge problem concerns the permissibility of a school system's entirely closing or failing to furnish, for reasons other than an actual lack of resources, any sort of school library or close substitute therefor. To some, such an action by the school board would be entirely unproblematic. Chief Justice Burger, for example, wrote that "[o]f course, it is perfectly clear that, unwise as it would be, the board could wholly dispense with the school library, so far as the first amendment is concerned."[109]

Under our theory, however, we must at least hold open the possibility that such a board decision, perhaps in conjunction with other decisions, could have the effect, whether intended or not, of causing significant relevant capacity impairment. The absence of any sort of school library or its equivalent puts some strain on the classroom teaching component of the development of free speech capacities. While our focus is on effects, rather than the school board's intentions, we may wish to trace effects through intended effects, and we are properly constitutionally curious about, for example, a school with ample space and resources for at least an informal library that refuses all donations.[110]

VIII. Student Speech Rights and the Rights and Interests of Bystander Students

The Supreme Court in *Tinker* required, for free speech protection, that the student speech not only not materially disrupt classes, but also that it not rise to the level of "an invasion of the rights of others."[111] The precise character of the rights referred to, or the nature of the invasion, was not definitively specified, but the Court evidently found some relevance in its conclusion that the petitioners in

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107. *Cf.* Freeman, *supra* note 31, at 44 (maintaining the illimitability in principle of any such right).

108. *See* Garvey, supra note 11, at 348.

109. *Pico*, 457 U.S. at 887 n.3 (Burger, C.J., dissenting). *See also* Diamond, *supra* note 24, at 511 n.145.

110. *Cf.* Levin, *supra* note 10, at 1659 (discussing the absence of any constitutional mandate of any school library at all).

111. *Tinker*, 393 U.S. at 513.

Tinker had not "sought to intrude in the . . . lives of others."[112]

While it seems possible in some sense to intrude into the lives of other students without thereby necessarily committing an actionable, tortious invasion of their legal rights, there has in fact been some support for the view that the rights-invasion branch of *Tinker* is or should be confined to tortious right invasions.[113] The Supreme Court's recent willingness in *Fraser* to permit sanctions imposed on students for lewd, vulgar, potentially offensive language in the presence of at best equivocal evidence of class disruption,[114] suggests that the present Court majority may not be willing to confine the rights-invasion prong of *Tinker* to conduct amounting to a tort against fellow students.

Our approach, which allows restriction of student speech in the absence of relevant capacity impairment, assuming some reasonable and legitimate state interest in the restriction, allows the school system to make the following kind of argument with respect to the interests of third-party students: in the school's conscientious determination, some or all students of a particular age and grade risk being exposed to unnecessary, unjustifiable psychological harms, even if such exposure is non-tortious, such as being called on to voluntarily complete frank sexual questionaires, or become accurately informed of the collective results of a sampling, representative or not, of her peers, who may well set the chief standard of normalcy for her.[115] In a given case, the risk of even non-tortious psychological harm to young students might be thought to outweigh the contribution of the speech potentially inflicting such harm to the free speech capacity development of the speaker and audience.

Whether an interpretation that equates the "rights invasion" justification for restricting student speech rights with "tortious rights invasion" allows greater predictability and provides clearer guidance to school administrators is in practice unclear. It may also not minimize the school's litigation expenses. Simply referring to the tort-nontort distinction as a "previously defined"[116] legal standard does not imply that a typical school administrator will be any better at predicting whether a reviewing court will pronounce the conduct tortious, in a common close case, than she might be at determining significant free speech capacity impairment. Additionally, the tortious conduct standard for rights invasion still requires the school to spend resources in common borderline tort cases defending suits by either alleged tort victims of the speech or by speakers or listeners if the school determines the speech restrictions to be justified. The school's litigation expenses would likely be minimized by a broad prior restraint rule, with necessary allowances for the presumably rare case of future free speech capacities' being significantly impaired.

Finally, it has been argued, in effect, that the actionable tort standard has the advantage, over a more subjective or less judicially guided standard, of lending itself less easily to a process of cementing arbitrary middle-class values into

112. *Id.* at 514.

113. *See* Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1375-76 (8th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3489 (U.S. Jan. 20, 1987) (No.86-836); Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 640-41 (1984) (discussing Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978)).

114. *See Fraser*, 106 S. Ct. at 3165-66.

115. *See* Note, *supra* note 113, at 640.

116. *Id.* at 641.

the notion of not offending or intruding upon the broad rights of others.[117] But one lesson schools should feel constitutionally free to impart is that one's own, or a majority's, sensibilities may not be the only consideration in determining the offensiveness of a possible speech. Without imposing merely parochial standards, there seems no convincing basis in free speech law to proscribe imparting some arguably "middle class" values, such as, for example, the importance of "book learning."

IX. PUBLIC FORUM ANALYSIS AND STUDENT SPEECH

A number of recent judicial opinions have suggested that distinctive progress can be made in resolving a variety of public school student speech cases through applying the three-part forum analysis emphasized by the Supreme Court in recent cases such as *Perry Education Association v. Perry Local Educators' Association*[118] and *Cornelius v. NAACP Legal Defense and Educational Fund.*[119] In this general context, the Court has sought to distinguish "quintessential" or historic public forums, such as streets and parks; limited purpose or government designated public forums; and non-public forums. Generally, the rigidity of the standards constitutionally imposed on government restriction of speech decreases in the order described. With regard to non-public forums, for example, the Court has held that "[c]ontrol over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[120] In the case of designated forums, however, the Court has determined that "when the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest."[121] With regard to designated forums, "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."[122]

Public forum analysis provokes more questions than can immediately be judicially answered. The doctrine as a general instrument has its detractors, both judicial[123] and academic.[124] Regardless of the doctrine's possible merits in general, its application in the public school cases amounts to the use of a rather blunt, or amorphous, instrument to do a refined, delicate job.

It is problematic, for example, how typical kinds of school newspapers

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117. *Cf. Fraser*, 755 F.2d at 1363, *rev'd*, 106 S. Ct. 3159 (1986) (discussing the risks of cementing such standards in place). *See also* Note, Tinker *Revisited*: Fraser v. Bethel School District *and Regulation of Speech in the Public Schools*, 1985 DUKE L.J. 1164, 1186.

118. 460 U.S. 37 (1983). *See also* Searcey v. Crim, 642 F. Supp. 313, 315 (N.D. Ga. 1986), *aff'd in part and vacated in part*, 815 F.2d 1389 (11th Cir. 1987).

119. 105 S. Ct. 3439 (1985).

120. *Id.* at 3451.

121. *Id.* at 3448.

122. *Perry*, 460 U.S. at 46.

123. *See Cornelius*, 105 S. Ct. at 3466 (Stevens, J., dissenting) (expressing a degree of skepticism as to the distinctive actual utility of forum analysis in resolving cases).

124. *See, e.g.*, Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1223-24 (1984) (expressing skepticism as to whether forum analysis in general concentrates attention on the significant values and interests at stake).

should be categorized on this schema. *San Diego Committee Against Registration and the Draft (CARD) v. Governing Board*[125] involved typical circumstances. In this case, the court on appeal held, on the basis of a detailed factual examination of the operation, policies, functioning, lines of authority, practices and procedures, and the authorizing statements and institutional relationships of the school newspaper, that the newspaper fell into the second forum category, that of designated fora, rather than the third category, or non-public fora.[126]

It might well be reasonable to conclude, however, that most ordinary public school newspapers produced with the efforts and support of both school officials and the students, whether the newspapers are narrowly curricular or coursework-oriented or otherwise tightly administratively controlled, simply do not fit neatly into any of the three forum categories; however, they may ultimately be defined, and whether we take this to be a matter of law or of fact.

Most ordinary school newspapers are intended for public, or at least broad intra-school dissemination, unlike the fora or means of communication of the pure third, non-public category. But they are also importantly intended to train authoritatively the students involved, to supplement and advance the school's pedagogical aims, and generally to impart educational lessons, whether or not they are also intended to serve as a more or less broadly open forum for the expression of the views of students, or outsiders, on a broad range of topics. The reasons counseling against a requirement of viewpoint neutrality in each class, or in the school in general, also apply in the context of most student newspapers produced under the school's auspices. There is no free speech requirement that all public schools make concessions, for example, to social disintegration and fragmentation, such that to promote interracial harmony within a school newspaper is to "open the door" to a demand for fair presentation of the opposite point of view.[127] A school's refusal to publish such views in the school newspaper may be satisfactorily explained not on the basis of viewpoint discrimination, but on evident educational unsuitability and incompatibility with the basic missions of the public schools and the education of minor children.

While school newspapers are perhaps the most common organized means of expression generating student speech cases, a number of cases have grappled with student speech issues in the context of school plays. In *Seyfried v. Walton*,[128] for example, the court on appeal sought to draw a distinction between non-program related student newspaper expressions of opinion on the one hand, and voluntary but more narrowly curricular activities, such as the school play involved in *Seyfried*, on the other.[129] Speech expression in the latter context was thought to be properly subject to broader regulation.[130] It is difficult to believe, though, that it is best to ground major differences in free speech rights on only

125. 790 F.2d 1471 (9th Cir. 1986).

126. *Id.* at 1476. *See also Kuhlmeier*, 795 F.2d at 1371-74, 1378.

127. *Cf.* 790 F.2d at 1481; Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431, 437 (3d Cir. 1985) ("[v]iewpoint discrimination, of course, is impermissible regardless of the nature of the forum"). By way of contrast, consider Nicholson v. Board of Educ., 682 F.2d 858, 863 (9th Cir. 1982) (student newspaper found to be curricular; a vehicle for imparting journalism class skills and values such as accuracy and fairness).

128. 668 F.2d 214 (3d Cir. 1981).

129. *Id.* at 216.

130. *Id.*

the minimal, if not utterly elusive, distinctions in tightness of integration of a particular school program or activity into the narrowly conceived curriculum of the school — e.g., that some newspapers, produced even in journalism class perhaps, must be left relatively unconstrained, but a play produced in theater class need not.

The logic of *Seyfried* was rejected in favor of an even less satisfactory approach in *Bowman v. Bethel-Tate Board of Education*.[131] In *Bowman*, the district court enjoined the school board's halting of a play to be presented by a group of third graders at a parent-teacher association meeting. The court focused on the voluntary character of the children's participation, and characterized the board's rejection of the play, for allegedly glorifying cowardice, denigrating patriotism, and disparaging the aged, not as a rejection based on educational unsuitability, but as an attempt to suppress the expression of disfavored ideas. Stopping the play was analogized to the removal of a book from the shelves of the school library.[132]

Realistically, it may be doubted whether the eight year old children in *Bowman* in fact wanted to express, or even understood, the particular ideas in question, as opposed to simply wanting to be in the play, voluntarily or at parental behest. Similarly, even purely voluntary school activities may be intended by the school officials to impart particular ideas or build particular skills. The school in this instance may quite reasonably have wanted to avoid giving offense to even a minority of parents at the parent-teacher association meeting. There is a vital difference between the free speech rights of adults to speak offensively, and those of eight year olds to speak offensively, or to say things that unintentionally give offense. The former may be truly a necessary evil, the latter an ordinarily unjustifiable one.

While it is perfectly sensible to argue that the better analogy to stopping production of a play is to stopping midway through the process of ordering a library book, rather than removing it from the shelves,[133] this kind of argument misses the fundamental problem of the logic of *Bowman*. This is simply that we do, or should, care far more in the free speech context about the impact of any imposed restrictions on the future selves of the eight year olds than about any immediate free speech effects on the children themselves, as eight year old schoolchildren.

X. The Role of Judicial Deference and Expertise

Proper resolution of student speech cases is unlikely on a consistent basis unless some care is taken in attending to the precise relative advantages and competencies of judges, local and national experts of various sorts, and democratically elected school officials and their agents. It will not suffice to characterize the crucial issue as "whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils . . . ."[134] There is doubtless merit, within its proper scope, to the judicial tradition of deference to the

131. 610 F. Supp. 577 (S.D. Ohio 1985), *vacated mem.*, 798 F.2d 468 (6th Cir. 1986).

132. *See id.* at 579-81.

133. A diversity of Supreme Court opinion is expressed on this point in *Pico*, 457 U.S. 853 (1982).

134. *Id.* at 885 (Burger, C.J., dissenting).

management discretion of local school authorities, who may be both popularly elected and particularly familiar with the values and preferences of the local community, in addition to having familiarity with the operation of local pedagogical practices.[135] But, while under our theory judicial intervention into student speech issues will presumably be rare, the logic of deference is an incomplete and misleading explanation for this result.

To begin with, while "American public education has always been under local political control . . .,"[136] the scope, applicability, and infringement of free speech rights are matters that are intended precisely not to be subject to local majoritarian control. Under our theory, the significant impairment of students' future free speech capacities cannot be justified by any mere preferences and insights of local officials, or local values, no matter how popular or otherwise reasonable. The presumed advantage in understanding first amendment law must go to the federal courts, even if one assumes that the compatibility of local federal judges' values with those of the populace in general played no role in their selection. Of course, matters of educational pedagogy, and the actual impact of a given school curriculum on local students, may be crucial under our theory in deciding a given case.

It is doubtful, however, whether a member of even a distant United States Supreme Court, being well-briefed and benefitting from the views of local as well as leading national experts, in the record or via the briefs filed, and with an opportunity to pose questions on oral argument, is really at a disadvantage compared to local political decisionmakers on matters even of educational theory, psychology, and cognitive development. It may be unrealistic to assume that local officials understood the impact of their curricular policies on their students in a way that is simply not communicable to the justices who must decide the case. With or without such mechanisms as amicus briefs, the judiciary may be in at least as good a position to draw upon and comprehend the range of relevant national expertise as the local decisionmakers were in at the time of their decision.[137] Even if we assume infinite conscientiousness on the part of local decisionmakers, even the most distinctively non-legal issues may not be particularly local in nature.

Even if these considerations were of no effect, it would still be important to note that our approach to student speech tends to minimize the risks of inappropriate judicial intrusion. It is plausible to argue that a distant judiciary may "miss" some subtle classroom distraction or interference with the classroom learning process.[138] It is less plausible to maintain that the distant judiciary will tend to commit the opposite error, of "hallucinating" some imagined significant free speech capacity impairment that is not really present, for reasons understood by local officials but incomprehensible to the judiciary. If the students cannot, at graduation,[139] describe the American political process, for example,

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135. *See Fraser*, 755 F.2d at 1368 (Wright, J., dissenting), *rev'd*, 106 S. Ct. 3159 (1986); Diamond, *supra* note 24, at 482, 498-500; Freeman, *supra* note 31, at 69-70.

136. Diamond, *supra* note 24, at 498.

137. *But cf.* Tushnet, *supra* note 40, at 754 (inevitability of judicial reliance upon professionals in areas where social science evidence is important).

138. *See* Diamond, *supra* note 24, at 497.

139. There seems no reason not to toll the statute of limitations in such cases until graduation or the age of majority, to allow both parties the best opportunity to build a concrete case.

in any rudimentary way, the judiciary may rightly be impatient of esoteric explanations by school officials of why this is inevitable.

There are thus insufficient grounds for concluding that "courts should apply only a limited standard of review to local school administration action: the minimum rationality standard currently used to review government activity that does not implicate fundamental rights."[140] Fundamental rights, though of a limited scope, are indeed involved. While "contemporary community standards"[141] have an undoubted role to play in first amendment adjudication, there is not much point to constitutional protection if they are invariably decisive,[142] or if any minimal legitimate public purpose trumps the free speech right.

It should be noted that our cases differ in a number of respects from the due process cases the Court has confronted in which, for example, a student has been dismissed from college or professional school for reasons of alleged deficiencies in academic or professional performance.[143] Even if the right to remain in medical school except for legitimate reasons were of the same constitutional moment as the right to freedom of speech, we would expect greater judicial deference to the conscientious efforts of colleges of medicine to sort out marginal doctors than we would in the more accessibly common-sensical inquiries our free speech rule would require.

Finally, despite the expressions of deference to the discretion of local political decision-makers, the courts have at least occasionally been willing, in small cases and great, to in effect overrule the pedagogical judgment of local officials in the context of a significant rights violation. In *Meyer v. Nebraska*,[144] for example, the Court, without citation to the record or to any authority, concluded, contrary to the evident determination of Nebraska authorities, that "[i]t is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child."[145] The Court in effect constitutionally overrode a collective decision by the State to allow the study of languages such as Greek and Latin, but not German and French, during the early grades, despite whatever pedagogical arguments the school might have mustered.

More importantly, it is possible to interpret the landmark case of *Brown v. Board of Education*[146] as implying a judicial willingness to implicitly overrule the determination by local school officials that the quality of education for black children — and perhaps this could be translated into terms of the significant impairment of the general future capacities of current black students — was not

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140. Diamond, *supra* note 24, at 477.

141. See Miller v. California, 413 U.S. 15 (1973) which, in the context of obscenity, leaves open the issue of the relationship between community standards and any "saving" serious literary, artistic, political, or scientific value in the allegedly obscene work.

142. *Cf.* Diamond, *supra* note 24, at 507-08 (discussing conflicting roles of community standards and non-majoritarianism in first amendment adjudication).

143. *See, e.g.*, Board of Curators v. Horowitz, 435 U.S. 78 (1978) (no violation of due process when respondent was fully informed of faculty dissatisfaction with her academic performance prior to dismissal).

144. 262 U.S. 390 (1923).

145. *Id.* at 403. *See also* Garvey, *supra* note 11, at 343.

146. 347 U.S. 483 (1954).

being significantly impaired in a constitutionally suspect way under the established school system.[147]

The case for only limited intervention by the courts into the operations of the public schools in student speech cases thus need not rely heavily on considerations of deference and comparative expertise. Overruling the judgment of the relevant Topeka officials on the largely empirical matter of the development of the educational capacities of black students was not thought to by itself be hopelessly complex or illegitimate in *Brown*. It is not the commands of judicial deference, but the narrow legitimate scope of the free speech rights of public schoolchildren, that best justifies only infrequent judicial intervention in public school decisions regarding the rights of juveniles under the free speech clause. Under our substantial future free speech capacity impairment test, as outlined above, the courts may intervene to vindicate genuine deprivations of student free speech rights, while respecting the proper scope of discretion of democratically elected local educational authorities.

147. *Cf.* Diamond, *supra* note 24, at 507-09 (emphasizing the considerations favoring greater judicial deference toward local school board determinations generally).